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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

AVAILABILITY OF BOUND VOLUMES

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decision

T.D. 85-196

Revision of Fee Charged Proprietors of Warehouse Facilities

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document advises the public that the annual fee charged proprietors of Customs bonded warehouses for audits, inspections, and related services is being revised for 1986. The fee, which is based upon the actual number of open warehouse entries on file by any particular warehouse proprietor, is charged in order to return to the Government the approximate cost of the services provided at these facilities by Customs officers.

EFFECTIVE DATE: January 1, 1986.

FOR FURTHER INFORMATION CONTACT: John Holl, Office of Inspection and Control (202-566-8151), or Matthew J. Krimski, Regulatory Audit Division (202-566-2812), Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

Background

By T.D. 82-204, published in the FEDERAL REGISTER on November 1, 1982 (47 FR 49355), Customs amended its regulations contained in title 19, Code of Federal Regulations, Chapter I (19 CFR Chapter I), to implement changes relating to the control of merchandise in Customs bonded warehouses by establishing an audit-inspection program. That document also provided for the assessment and collection of fees to establish, alter, or relocate a bonded warehouse and an annual fee to reimburse the Customs appropriation for services rendered to the warehouse community.

As amended, § 19.5, Customs Regulations (19 CFR 19.5), provides that each warehouse proprietor will be charged a fee to establish, alter or relocate a warehouse facility which shall be determined under 31 U.S.C. 9701. By T.D. 85-70, published in the FEDERAL REG-

ISTER on April 17, 1985 (50 FR 15414), the original fees set forth in T.D. 82-204 were revised as follows:

1. Establish a bonded warehouse—$1,021.
2. Alter an existing bonded warehouse—$442.
3. Relocate an existing bonded warehouse—$442.

In addition, each warehouse proprietor granted the right to operate a warehouse facility is charged an annual fee which is determined under § 555, Tariff Act of 1930, as amended (19 U.S.C. 1555).

The purpose of the annual warehouse fee is to reimburse the Customs appropriation for services rendered to the warehouse community including audit, inspection, and related administrative costs, and is to be projected on the basis of the annual cost of Customs in the preceding year plus any Federal salary increases.

From the time that the audit-inspection program started in November 1982, by T.D. 82-204, until publication of a revised fee as T.D. 85-36 in the FEDERAL REGISTER on February 27, 1985 (50 FR 8043), the fee had been $650. The February notice, which was effective retroactively to January 1, 1985, set the fee for 1985 at $1,400.

The 1985 fee was based on the calculation of actual resources for 52 Customs positions authorized for the audit-inspection program. The calculation included salary, benefits, overhead, travel and related expenses for 17 auditors and 35 inspectors. The total came to $2,154,808, which when divided by the 1,533 bonded warehouses yielded an annual fee of $1,406 for each warehouse. This figure was rounded down to $1,400. The 1986 calculations for the necessary resources include the last pay raise, but have been slightly lowered because it has been determined that the audit-inspection functions can be accomplished by utilizing a few lower graded positions. The total necessary resources to fund the 35 inspectional positions and 17 audit positions amounts to $2,115,559, which when divided by the present number of warehouses (1495) equals $1,415 per warehouse.

However, because of interest from the warehouse industry and of the concern of Customs management to equalize these fees as best possible, it has been decided to establish a tiered system of fees based on the number of open warehouse entries during any part of each warehouse's business year.

The tiered system requires the following fees for 1986:

Tier I (0-100 entries)=$1,000.

Tier II (101 to 500 entries)=$2,500.

Tier III (501 or more entries)=$5,000.

At the present time there are 1176 warehouses in Tier I, 248 in Tier II, and 71 in Tier III. If Customs collects the above-stated fee from each of them, the total collected will be $2,151,000. This would equal $1,439 per warehouse. However, Customs expects that the total collections will be less because the number of warehouses declines slightly each year.

The selection of the tier criteria was based on Customs best judgment in order to give relief to the small warehouses and apportion the remaining costs of the program in a logical manner to the larger warehouses. With an established average fee of $1,400 for 1985 as a starting point, it was decided that the smaller warehouse fee should be less than the 1985 average fee. By selecting $1,000 as the minimum fee for warehouses, the two higher tiers had to absorb the difference in the lowered fee. The fee adjustment also took into account the fact that Customs is precluded from collecting more than the cost of efforts expended in the warehouse audit-inspection program.

Under the tiered system, the 1986 fee will be $400 less than the 1985 fee for approximately 79 percent of all warehouses. The remaining two tiers will pay increases, but it is Customs opinion that these fees will still be significantly lower than those paid under the old system when Customs Warehouse Officers were assigned to warehouses. It is estimated that Tier II and Tier III warehouses, many of which used to have a Customs Warehouse Officer assigned, would today by paying approximately $20,000 annually to reimburse Customs for the services of an officer. In Customs judgment, this represents a significant savings for Tier II and III warehouses while offering relief to the smaller warehouse operations.

ACTION

The annual fee to be charged for 1986 is established on a 3-level system. The fee for those proprietors holding merchandise covered by 0 to 100 entries is set at $1,000 (this level includes approximately 79 percent of the affected proprietors). The fee for those proprietors holding merchandise covered by 101 to 500 entries is set at $2,500 (this level includes approximately 16.5 percent of the affected proprietors). Finally, the fee for those proprietors holding merchandise covered by 501 or more entries is set at $5,000 (this level includes approximately 4.5 percent of the affected proprietors).

AUTHORITY

The authority for this change is contained in 19 U.S.C. 66, 1312, 1551, 1555, 1624, 1646a, and 31 U.S.C. 9701.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: November 26, 1985.

JOHN W. MANGELS,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, December 6, 1985 (50 FR 50032)]

Appeal to the U.S. Court of Appeals for the Federal Circuit

HERAEUS-AMERSIL, INC. v. UNITED STATES, 9 CIT——, Slip Op. 85–88 (August 27, 1985), *appeal docketed,* No. 86–650 (Fed. Cir. Nov. 14, 1985).

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
James L. Watson
Gregory W. Carman
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Thomas J. Aquilino, Jr.

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Bernard Newman

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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 85–121)

BROOKSIDE VENEERS, LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81–9–01305

Before: CARMAN, *Judge.*

MEMORANDUM OPINION AND ORDER

[Defendant's motion granted in part.]

(Decided November 27, 1985)

Stedina and Deem (Charles P. Deem on the motion) for the defendant.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division (*Saul Davis* on the motion) for the defendant.

CARMAN, *Judge:* Defendant United States asks the Court to strike the brief of plaintiff Brookside Veneers, Ltd. Plaintiff submitted the brief to this Court in support of its action contesting defendant's classification of imported merchandise. The parties submitted the case to the Court on stipulated facts in lieu of trial. Defendant objects to plaintiff's brief because the appendix contains materials not stipulated as exhibits by the parties, and the arguments in the brief rely on these materials. Defendant alternatively requests that, if the Court does not strike plaintiff's brief, the Court allow defendant to withdraw its stipulation and set a date for trial. It appears to the Court that materials in plaintiff's brief may improperly contradict or supplement the stipulated facts. The Court therefore grants defendant's motion and directs that plaintiff's brief be returned to plaintiff, and further directs plaintiff to file a new brief with the Court which does not contain materials that contradict or supplement the stipulated facts.

BACKGROUND

The United States Customs Service (Customs) has classified plaintiff's merchandise as "articles not specially provided for, of wood," under item 207.00 of the Tariff Schedules of the United

States (TSUS), while plaintiff contends it should be classified as "wood veneers," under item 240.03 of the TSUS. The parties stipulated to a number of facts concerning the production and use of plaintiff's merchandise. In addition, they stipulated to eight Collective Exhibits, including such things as trade publications and samples of plaintiff's merchandise and other merchandise. When plaintiff submitted its brief in the case, the brief contained an appendix comprised of the following material:

T.D. 39453
C.I.E.—188/48
C.I.E.—288/50
T.D. 52536(1)
Tariff Classification Study
Plaintiff's Letter to Senator Bradley
H.R. 6975
Senate Report No. 96–999
Hearings before Committee on Ways and Means on H.R. 6975
Letter from Senator Bradley to Plaintiff
Letter from Customs to Senator Bradley

Defendant has two grounds for objecting to plaintiff's brief. The first involves the nature of stipulations and the second involves the posture of this action before the Court. First, parties are bound by stipulations and may not introduce testimony that tends to establish facts *contrary* to those stipulated. *H.A. Whitacre, Inc.* v. *United States,* 22 CCPA 623, 630, T.D. 47615 (1935). To the extent that the materials in plaintiff's brief tend to contradict any of the stipulated facts, they have been improperly presented to the Court.

Second, this case is before the Court on a stipulation of facts in lieu of trial. The stipulation functions as the trial transcript, and the parties' briefs are akin to post-trial briefs. In reaching its decision, a trial court may not consider evidence not properly offered or received. *R.C. Williams & Co., Inc.* v. *United States,* 26 CCPA 210, 217–18, C.A.D. 19 (1938). Such evidence is not a part of the trial record. *See id.* Here the stipulated facts and agreed upon exhibits constitute the entire trial record. When the court renders a decision on stipulated facts in lieu of trial, evidence outside the stipulation is not properly before the Court. If plaintiff in its brief has included any supplemental evidence, not otherwise cognizable by the Court, then the Court may not consider that evidence.

Although the court's rules do not specifically provide for striking a brief, this Court has ruled that it is appropriate to strike improper portions of briefs. *See Application of Harrington,* 55 CCPA 1459 (Patents), 392 F.2d 653 (1968). In *Harrington,* the court declined to strike a brief that allegedly contained "improper allegations" and "vituperative statements." The court there apparently viewed the challenged portions as legitimate arguments on behalf of the appelee. By contrast, in *Dreyfus* v. *Lilinfeld,* 18 CCPA 1526 (Patents), 49

F.2d 1055 (1931), one of the parties referred to and quoted from proceedings at the administrative level that were not a part of the record. The court there wholly disregarded the objectionable matter and considered only what was properly in the record. The court stated:

> Had the full extent of counsel's offending in this regard been earlier known to us, we should have felt constrained to strike the entire briefs and require the filing of new ones properly limited.

49 F.2d at 1062.

In this case, it appears that plaintiff has presented evidence which may improperly contradict or supplement the stipulation. To ensure defendant the full protection of the rules of this court regarding stipulations and the introduction of evidence at trial, the Court grants defendant's motion and orders that plaintiff's brief be returned and that plaintiff file a new brief with the court within 30 days of the date of the entry of this order which does not contain materials that contradict or supplement the stipulated facts.

(Slip Op. 85–122)

UNITED STATES, PLAINTIFF *v.* PRISCILLA MODES, INC. and SAM LIEBERMAN, DEFENDANTS

Court Number 84–4–00493

BEFORE: CARMAN, *Judge.*

OPINION AND ORDER

[Defendants' motion to dismiss denied.]

(Decided November 27, 1985)

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division (*Sheila N. Ziff* on the motion) for the plaintiff.

Kaye, Scholer, Fierman, Hays and Handler (*William H. Freilich* on the motion) for the defendants.

CARMAN, *Judge:* Before the Court is the motion of defendants, Priscilla Modes, Inc. and Sam Lieberman, to dismiss the complaint of the plaintiff United States brought under 19 U.S.C. § 1592 (1982) to enforce a civil penalty. Defendants claim that the complaint does not allege fraud with particularity as required by Rule 9(b) of this court, that the complaint is subject to dismissal under Rule 12(b)(6) for failure to state a claim upon which relief may be granted, that the complaint does not give defendants fair notice of the claim asserted as required by Rule 8(a), and that plaintiff's attorney of record violated Rule 11 because the complaint is not well grounded in fact.

BACKGROUND

On April 6, 1984, plaintiff filed a complaint alleging that defendants entered, caused to be entered, or aided in the entry of wearing apparel from Scotland under documents that undervalued the apparel. Plaintiff identified the entries by attaching a descriptive exhibit to the complaint. The complaint alleged that the defendants knowingly and willfully undervalued the apparel, and that defendants' actions caused plaintiff to lose duties of $206,444.61, and violated 19 U.S.C. §§ 1481, 1484, 1485 and 1592. Counts I through III incorporated these allegations by reference and alleged, alternatively, that defendants' acts were the result of fraud, gross negligence, or negligence. Defendants moved to dismiss for the reasons stated above. Plaintiff amended its complaint to state with more particularity the elements of the alleged fraudulent conduct and the relationship between the individual defendant Sam Lieberman and the corporate defendant Priscilla Modes, Inc. Defendants responded by persisting in their motion to dismiss. The Court finds that plaintiff's amended complaint alleges fraud with sufficient particularity, is sufficient to give defendants notice of the claims made against them, and states a claim upon which relief can be granted. Defendants' motion to dismiss is therefore denied.

OPINION

Rule 9(b) provides that, in "all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity." Rules 9(b) and 8(a) of the Federal Rules of Civil Procedure (FRCP) are identical to this Court's Rules 9(b) and 8(a), and it is therefore appropriate to look to the standards developed under the FRCP for guidance in the interpretation of this Court's rules. The purposes of Rule 9(b) are to ensure "that a defendant is afforded fair notice of the nature of plaintiff's claim and the grounds upon which it is based," and "that allegations of fraud will not be advanced lightly or without some factual basis." *Fulk* v. *Bagley*, 88 F.R.D. 153, 164 (M.D.N.C. 1980).

However, Rule 9(b) should be read in conjunction with the notice pleading requirement of Rule 8, which provides that a complaint should set forth "a short and plain * * * statement of the claim." *See U.S.* v. *F.A.G. Bearings Corp.*, 8 CIT ——, 615 F. Supp. 562 (1984); *see also Picture Lake Campgrounds, Inc.* v. *Holiday Inns Inc.*, 497 F. Supp. 858, 866 (E.D. Va. 1980). Thus "Rule 9(b) does not require nor make legitimate the pleading of detailed evidentiary matter." 2A J. Moore & J. Lucas, *Moore's Federal Practice* § 9.03, at 9-28–9-30 (1985). *See also* C. Wright & A. Miller, *Federal Practice and Procedure*, § 1297, at 406–07 (1969). If a complaint identifies the circumstances constituting the fraud so that the defendant can respond to the allegations, Rule 9(b) has been satisfied. *Walling* v. *Beverly Enterprises*, 476 F.2d 393, 397 (9th Cir. 1973); *McGinty* v.

Beranger Volkswagen, Inc., 633 F.2d 226, 228 (1st Cir. 1980). *See F.A.G. Bearings*, 615 F. Supp. at 567.

Count I of the First Amended Complaint meets the requirements of Rules 9(b) and 8: it claims that defendants knowingly and willfully undervalued merchandise and failed to declare its actual price, it lists specifically the alleged false documents, and it claims that as a result of the alleged fraud defendant was injured. The alternative counts of gross negligence and negligence in Counts II and III are also sufficiently specific to apprise defendants of the nature of the allegations and to enable them to frame a responsive reply. The First Amended Complaint further specifies the relationship of the defendant Lieberman to Priscilla Modes, Inc. and details the basis for the allegations of joint and several liability for the alleged violations of 19 U.S.C. § 1592.

Defendants also argue that plaintiff's complaint should be dismissed pursuant to Rule 12(b)(6) because it fails to state a claim for relief. By alleging a violation of 19 U.S.C. § 1592 and the consequent loss of duties, the complaint states a claim upon which relief can be granted. Finally, defendants argue that plaintiff's attorney filed a complaint not grounded in fact, as required by Rule 11. The complaint here makes specific factual allegations regarding the falsity of specific documents submitted by defendants. Therefore, it cannot be said that plaintiff's attorney filed a complaint not grounded in fact.

Defendant's motion is hereby denied.

It is so ordered.

(Slip Op. 85–123)

THE UPJOHN COMPANY, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81–8–01015

Before: DiCARLO, *Judge.*

Plaintiff challenges defendant's classification of merchandise under item 403.90 of the Tariff Schedules of the United States, contending that such merchandise is properly classified as American goods returned under item 800.00, TSUS.

Held: The merchandise is a product of the Netherlands and is properly classified under item 403.90, TSUS.

[Judgment for defendant.]

(Decided November 27, 1985)

Donohue and Donohue (*Joseph F. Donohue, Jr., Margaret R. Polito* and *Charles E. Duross*, of Counsel) for the plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office (*Kenneth N. Wolf*) for the defendant.

MEMORANDUM OPINION AND ORDER

DiCARLO, *Judge:* Plaintiff brings this action pursuant to 28 U.S.C. § 1581(A) challenging defendant's classification of a single entry of

chemicals under item 403.90 of the Tariff Schedules of the United States (TSUS), as "[m]ixtures in whole or in part of any of the products provided for in [Subpart B]."[1] Plaintiff claims that the chemical is properly classified under item 800.00 TSUS, as American goods returned. The Court finds that the merchandise is a product of the Netherlands, and was properly classified under item 403.90, TSUS.

FACTS

The facts of this case as stipulated by the parties are as follows:

1. Plaintiff, the Upjohn Company (hereinafter "Upjohn"), manufactured at its plant in LaPorte, Texas, a chemical described by Upjohn for internal purposes as crude 390 HOP, which is also known generally in the trade as polymethylene polyphenyl isocyanate, and also as polymeric MDI. For purposes of convenience, this material will be referred to throughout this stipulation as crude 390 HOP.

2. The crude 390 HOP was exported from the United States to the Netherlands.

3. Upjohn produced the crude 390 HOP in the following manner: aniline was reacted with formaldehyde to form polymethylene polydiphenyl polyamine. The polymethylene polydiphenyl polyamine was reacted with phosgene to produce the crude 390 HOP, which contains isocyanate functional groups.

4. Isocyanates are reactive chemical compounds, each composed of a nitrogen atom bonded to a carbon atom bonded to an oxygen atom, hereinafter referred to as an -NCO group. Crude 390 HOP is a mixture of compounds of different molecular weights containing isocyanate groups. These compounds are: diphenylmethane diisocyanate, also known as methylene diphenyl diisocyanate (hereinafter referred to as "pure MDI"), triisocyanate, and other isocyanates of higher molecular weight, commonly referred to as "higher molecular weight structures." The lightest of these isocyanates is the pure MDI. The pure MDI molecule consists of 2 benzene rings joined together. Each ring contains one NCO (isocyanate) group [see Attachment A].[2] The triisocyanate molecule consists of 3 benzene rings joined together, with each ring containing one NCO group [see Attachment B]. The higher molecular weight structures consist of 4 or more benzene rings joined together, with each ring containing one NCO group [see Attachment C].

5. The crude 390 HOP described in paragraph 1 was sold by plaintiff to an affiliate, Upjohn Polymer B.V. (hereinafter "Upjohn B.V."), in an intercompany sale for $.1962 per lb. and was exported to the Netherlands. The merchandise was described on the com-

[1] Subpart B of Schedule 4, part 1 of the tariff schedules describes "Industrial Organic Chemicals." This Subpart was amended by section 223 of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979). Mixtures of products described in Subpart B are currently provided for under item 407.09, TSUS.

[2] The attachments referred to throughout the statement of stipulated facts are not reproduced in this opinion.

mercial invoice as "Crude 390 HOP (Polymethylene Polyphenylisocyanate)."

6. The exported crude 390 HOP was a mixture consisting of approximately 68.8 percent pure MDI, 13.1 percent triisocyanate and 18.1 percent higher molecular weight structures.

7. The exported crude 390 HOP was subjected to a treatment in the Netherlands by Upjohn B.V. by which heat was applied at low pressure causing a portion of the MDI contained in the crude 390 HOP to vaporize and separate from the remainder of the material. This process, known as evaporation, occurred in a vessel known as a thin film evaporator. The MDI which was thus separated exited through a duct at the top of the thin film evaporator. No changes in molecular structure resulted from this process.

8. The material that remained following separation exited through the bottom of the thin film evaporator, was cooled and sent to storage. It was a mixture of approximately 34.4 percent pure MDI, 26.1 percent triisocyanate, and 39.5 percent higher molecular weight structures.

9. The pure MDI which was separated and exited the top of the thin film evaporator was immediately subjected to a series of processes which further purified it.

10. The material described in paragraph 8 that remained is sometimes described by Upjohn for internal purposes as crude BLD. It is known generally in the trade as polymethylene polyphenyl isocyanate and as polymeric MDI. For purposes of convenience, this material will be referred to throughout this stipulation as crude BLD.

11. The crude BLD was sold by Upjohn B.V. to Upjohn Company (Plaintiff) for $.1962 per lb., exported from the Netherlands and is the subject of this case. It was described on the commercial invoice as "Crude BLD (Polymethylene Polyphenylisocyanate)."

12. The properties of the crude 390 HOP, the pure MDI and the crude BLD are set forth on Schedule "A" attached hereto.[3]

SCHEDULE "A"

Property	Crude 390 HOP exported from United States	Pure MDI	Crude BLD imported into United States
Isocyanate Equivalent (IE)	133.7	125.1	141.5
Acidity, percent as HCl	.065	.003	.13
Chloride, percent Hydrolyzable	.08	.003	.14
Chloride, percent Total Hydrolyzable	.27	.010	.56
Viscosity, cps at 25 C.[1]	35	25	1143
Pure MDI, percent	68.8	100	34.4
Triisocyanate, percent	13.1	0	26.1
Higher molecular structures, percent	18.1	0	39.5
Specific gravity	1.2	1.2	1.2
Color [1]	(2)	(2)	(2)

[3] Schedule "A," attached to the Stipulation, states as follows:

SCHEDULE "A"—Continued

Property	Crude 390 HOP exported from United States	Pure MDI	Crude BLD imported into United States
UV, percent T, 500 nm	73	100	65
UV, percent T, 400 nm	26.5	100	11
Form	(4)	(4)	(4)
Flashpoint	435	375	425

[1] The UV values indicate that the imported Crude BLD is darker in color than the exported Crude 390 HOP as a result of the removal of the pure MDI which is clear in color.
[3] Brown.
[2] Colorless.
[4] Liquid.

13. The components of the crude 390 HOP and crude BLD are the same, namely: pure MDI, triisocyanate, and higher molecular weight structures. The relative proportion of triisocyanate and higher molecular weight structures in the crude BLD following separation of a portion of the pure MDI from the crude 390 HOP increased in direct proportion to the amount of pure MDI removed from the crude 390 HOP. The remaining pure MDI in the crude BLD decreased in direct proportion to the amount of pure MDI removed from the crude 390 HOP.

14. The crude BLD remaining after the process described in paragraph 7, following storage as described in paragraph 8, was returned to the United States and blended by Upjohn with other polymeric MDI. The resulting products were known by the Upjohn tradename PAPI. These products were combined with polyols [a chemical group having a chain-like molecule containing an available group composed of one oxygen atom and one hydrogen atom] and additives to make types of polyurethane which are used to manufacture a variety of products that include furniture, adhesives/sealants, automotive interior trim, foundry core binders, laminated panel cores, insulation, structural foam, refrigeration insulation, particleboard binder, carpet underlay/adhesives and packaging.

15. The pure MDI resulting from the process described in paragraph 7, after further processing as described in paragraph 9, was mixed with other ingredients by Upjohn B.V. to produce products bearing the tradename ISONATE. (These products were not exported to the United States.) ISONATE products are combined with polyols and additives to manufacture types of polyurethane (which are different than those referred to in paragraph 14) which are used to produce a variety of products such as plastic automotive bumper/fascia, fenders, integral skin plastics, adhesives/sealants, solid tires, shoe soles, roller skate wheels, industrial wheel/rollers, elastic fibers, carpet underlay/adhesives, ski boots, and mechanical goods.

16. The polyurethanes described in paragraphs 14 and 15 depend on the presence of the NCO group. The variations in the types of polyurethanes may depend on the chemical structure of the po-

lyols, additives and catalysts which react with the NCO group as well as isocyanates used.

17. 390 HOP can be, and sometimes is, used as a blending material to produce certain PAPI products of the type referred to in paragraph 14. Such use depends on Upjohn's production needs.

18. The BLD remaining after the separation/evaporation process described in paragraph 7, plus the pure MDI following separation and further processing described in paragraph 9, were more valuable than the exported 390 HOP at the time of exportation. The remaining BLD did not increase in value as a result of the removal of the pure MDI.

19. The crude 390 HOP exported from the United States underwent a change in condition in the Netherlands as a result of the separation of a portion of the pure MDI. This caused the crude BLD to have a more viscous condition, *i.e.* a thicker consistency, after removal of a portion of the pure MDI. This change in condition is reflected on Schedule "A" in the property described as "Viscosity, CPS @ 25 C°." This change was a physical, not a chemical, change.

20. The crude BLD differs from the crude 390 HOP in isocyanate equivalents, and percentages of pure MDI, triisocyanate and higher molecular weight structures, as listed on Schedule "A".

21. The change in condition which occurred in the Netherlands is also reflected in the property described as "Isocyanate Equivalent (IE)" on Schedule "A". The isocyanate equivalent refers to the average of the equivalent weights of the different molecules present in a given mixture or compound. Pure MDI has an IE of 125 and crude 390 HOP has an IE above 125, due to the presence of the higher molecular weight structures. The removal of a portion of pure MDI (having an IE of 125) results in a greater percentage of molecules of higher equivalent weight in the mass of remaining crude BLD. Since IE reflects an *average* of the equivalent weights in the compound, the mixture following removal of the MDI has a higher equivalent weight, and therefore a higher IE, than the crude 390 HOP prior to removal of the pure MDI. The different isocyanate equivalents are shown on Schedule "A": 133.7 for the crude 390 HOP prior to separation of the pure MDI and 141.5 for the crude BLD after separation of the pure MDI. The change in IE is directly attributable to the separation of the pure MDI.

22. In a drawback statement dated June 4, 1975 (included herein as Attachment D), Upjohn sought amendment of its drawback rate embodied in T.D. 71–201–J which covers PAPI's manufactured with the use of aniline oil. In the statement, Upjohn stated:

> PAPI (Polymethylene Polyphenylisocyanate) is the group name for several similar, but not exact products listed below:
>
> PAPI
> Crude 390 HOP
> Crude BLD
> PAPI 135

These products are different in chemical properties but not chemical structure.

Plaintiff agrees that Attachment D was filed but does not concede that the document is relevant.

23. By the statements in Attachment D that the products are different in chemical properties and are similar, but not exact products, Upjohn was referring to the fact that each product differed in the amounts of MDI, triisocyanate and higher molecular weight structures present therein. These differences were caused by the use of different quantities of aniline to produce each product. The original application filed by Upjohn for drawback on PAPI dated April 1, 1970, to which the amendment of June 4, 1975 relates, is attached to this stipulation as Attachment E.

DISCUSSION

Item 800.00, TSUS, provides for free entry of "[p]roducts of the United States when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad." Whether the merchandise is classifiable under item 800.00, TSUS depends upon whether the imported crude BLD is a manufacture of the United States, and if so, whether the product was advanced in value or improved in condition while in the Netherlands.

"The first question to be determined is whether the imported merchandise is the merchandise that was exported. If it was the same, advance in value and improvement in condition are of importance; if it was not the same, value and condition are inconsequential * * *." *Shell Oil Co. Canada, Ltd.* v. *United States,* 27 CCPA 94, 98, C.A.D. 68 (1939); *see Burgess Battery Co.* v. *United States,* 13 Cust. Ct. 37, 48, C.D. 866 (1944).

Exported American products retain their identity as American products, provided they are not transformed into new products while abroad. "[S]uch articles might thereafter be imported [duty free] though *changed in condition,* provided, however, they were not *advanced* in value or *improved* in condition." *United States* v. *Tower & Sons,* 9 Ct. Cust. Appls. 135, T.D. 37981 (1919) (emphasis in original).

The question whether the crude BLD is a product of the United States depends upon whether it underwent a process of manufacture in the Netherlands which transformed the product into a new article of commerce. In *Anheuser-Busch Brewing Ass'n* v. *United States,* 207 U.S. 556 (1908), the Court stated:

> Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary, * * * There must be transformation; a new and dif-

> ferent article must emerge, "having a distinctive name, character, or use."

Id. at 562 (quoting *Hartranft* v. *Wiegmann,* 121 U.S. 609 (1887)).

Plaintiff contends that "while the product in this case changed in condition, as a result of the operations in the Netherlands, it did not so change in name, character or use as to become a new product * * *."[4] The Court disagrees, and for the reasons that follow finds that the processing which occurred in the Netherlands resulted in a change in the character of the merchandise.

Plaintiff argues that the facts in this case are similar to those in two decisions which held that residues of exported American goods were entitled to duty free treatment. In *United States* v. *Rubelli's Sons,* 8 Ct. Cust. Apls. 399, T.D. 37645 (1918), duty-free treatment was accorded to hard spelter which previously was exported to Canada in the form of soft spelter for use in galvanizing iron pipe. The soft spelter was brought to a molten form and iron pipes were immersed. The immersion produced some crystallization of the melted zinc, and the crystallized particles fell to the bottom of the tank, bringing with them a percentage of the impurities picked up from the pipes. The crystalized zinc particles deposited at the bottom of the tank were drawn off into molds, redistilled of impurities and imported as hard zinc spelter. *Id.* at 400.

The second case relied upon by plaintiff is *United States* v. *Tower & Sons,* 9 Ct. Cust. Apls. 135, in which the Court described the following process:

> Tungstic acid, produced in the United States, was exported to Canada in the condition of an impalpable yellow powder. The purpose of the exportation was to use the article in the manufacture of tungsten wire for incandescent lamp fillings. The processes applied in Canada are several. It is first dissolved in ammonia and the resultant insoluble materials filtered out. This rejected material is called "insoluble residue" and consists of small lumps of clay-like material said to contain tungsten, lime, and other impurities.

Id. at 135–36.

The *Tower* Court held that the question whether the insoluble residue was entitled to duty-free entry was controlled by *Rubelli's Sons, supra:*

> The process of production therefore of hard from soft spelter was but a process of segregation or elimination. So here the process of producing this "insoluble residue" is but a process of segregation or elimination, and the cases do not seem to be distinguishable. No new article of manufacture is produced.

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[4] Brief for Plaintiff at 11.

Tower, at 137.

A critical distinction, articulated by the Court of Customs and Patent Appeals in *Shell Oil Co. of Canada, Ltd.* v. *United States,* 27 CCPA 94, C.A.D. 68 (1939), distinguishes the present case from those cited by plaintiff. In *Shell,* American crude petroleum was exported to Canada, where it underwent a "cracking process," by which gasoline was extracted from the crude. The residue, invoiced as "Cracking still residue," was imported into the United States, and duty free treatment was denied by Customs and the trial and appellate courts. *Id.* at 95. The court held that the processing of the crude "resulted in new and distinctive articles—one being gasoline; the other being oil." *Id.* at 100.

With respect to the plaintiff's contention that the merchandise was entitled to duty free entry under the reasoning in the *Rubelli's Sons* and *Tower* cases, the court stated:

> An essential difference, it seems to us, lies in the fact that the hard spelter involved in the *Rubelli's Sons et. al.* case *supra,* and the "insoluble residue" of tungstic acid of the *Tower & Sons* case, *supra,* did not result from the processing of the materials from which they were derived for the purpose of changing the character or form of any element of the basic material, or for separating one element from another. The soft spelter exported was not processed to separate it into parts, as was the crude petroleum here, nor was the tungstic acid. The basic materials involved in those cases were applied immediately and directly to the manufacture of certain merchandise entirely different in character, and the respective residues of zinc and tungstic acid were not new articles.
>
> In the instant case the crude petroleum was not applied to the making or finishing of extraneous manufactures, but was itself, and by itself, processed in a manner which resulted in new and distinctive articles—one being gasoline; the other being oil.

27 CCPA at 100.

In *Tower* and *Rubelli's Sons,* the materials were not sent abroad in order to separate one part of the materials from the rest. No process was performed for the purpose of changing the exported materials. Rather, the returned goods were residues of materials which were exported in order to process other substances.

In contrast, the *Shell* crude petroleum was subjected to a separation process. The appellate court held that the purposeful separation resulted tin the creation of new articles which were not entitled to duty free treatment when subsequently imported into the United States. As in *Shell,* the Merchandise in this case was purposefully separated into two distinct products, crude BLD and pure MDI. The change in character which resulted from the separation is evidenced by the differences between the crude 390 HOP and crude BLD in numerous respects, including viscosity, isocyanate equivalents, and relative precentages of pure MDI, triisocyanate and isocyanates of higher molecular weight.

A further consideration also leads the Court to conclude that this case is controlled by *Shell.* In that opinion the court stated:

> Appellant's primary object doubtless was to obtain the element known as gasoline, but in the very process of obtaining this element there was also obtained the merchandise involved. That the gasoline *per se* was a resultant of the process and that it was someting distinct from the material exported seems clear, and to us it seems equally clear that the residue occupies the same status. The mere fact that it was not the primary article which appellant desired and that, in a sense, it was "unwanted" does not affect its *per se* status as an article resulting from a process of manufacture in Canada, nor does the fact its production was an unavoidable result of the process used in obtaining the particular article primarily desired effect that status.

27 CCPA at 98.

The Court finds that plaintiff's purpose in exporting the crude 390 HOP was to extract pure MDI from the crude 390 HOP. The Court also finds the pure MDI to be a new article of commerce. Through the evaporation process, by which plaintiff obtained the pure MDI, plaintiff also obtained the crude BLD. Under the reasoning of *Shell,* the crude BLD occupies the same status as the pure MDI—that of a new and different product.

Plaintiff attempts to distinguish *Shell* in four respects. First, it argues that petroleum is a crude product of nature, whereas the exported chemical mixture is a manufactured product. This distinction, however, was specifically rejected as a controlling consideration in *Shell*:

> One distinction between the imported materials involved in those cases and the imported material at bar is that the former were obtained from articles which had been manufactured in the United States, while the material here was obtained from a product which was exported in its natural state. That difference alone, however, would not be controlling because paragraph 1615, *supra,* is not confined to manufactures, or even to articles derived from manufactures, exported from the United States, but embraces also the crudest of materials which are of United States origin.

27 CCPA at 100.

Second, plaintiff argues that gasoline and heating oil are both finished products, whereas crude BLD must be blended to produce a marketable product. Noting in *Shell* states or even suggests that the imported product was denied duty free status because the imported merchandise was a final product. Since finished and non-finished products are not accorded different treatment in the tariff provisions in issue, the Court finds this distinction immaterial to whether the crude BLD is a returned American product.

A third distinction raised is that the exported and imported products in *Shell* could not be used interchangeably, whereas crude. 390 HOP is sometimes used in a manner similar to crude BLD. Under the reasoning stated in *Shell*, a residue from a separation process which yields a new article of commerce is likewise newly manufactured merchandise. 27 CCPA at 98. Since the Court finds that the pure MDI is a new article of commerce, and that the crude BLD resulted from the separation process performed upon the 390 HOP in the Netherlands, any similarity in the potential uses of the exported product and the imported residue is irrelevent under the *Shell* principle.

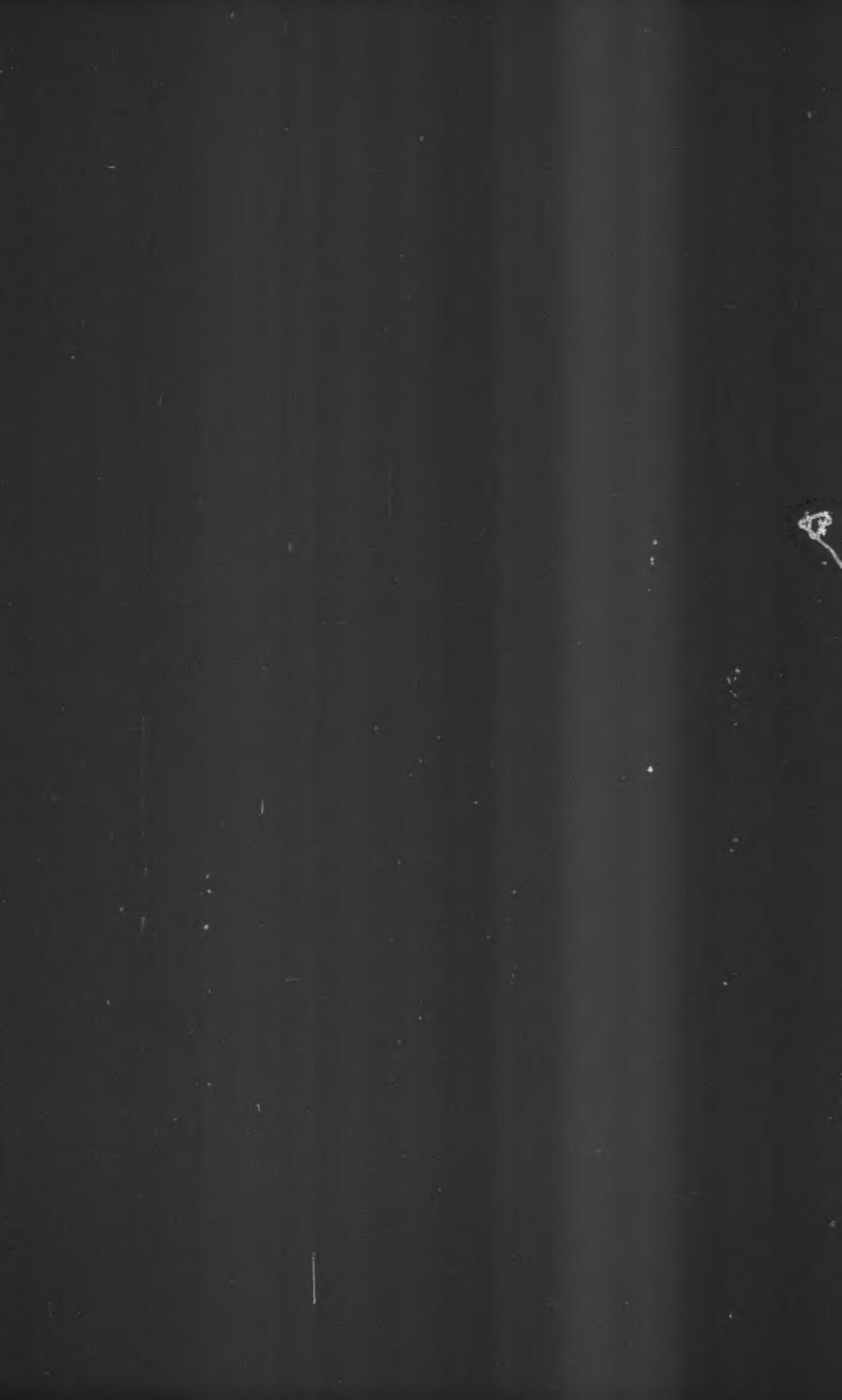
Finally, plaintiff points out that the "cracking" process applied to the crude petroleum in *Shell* is a process which breaks the molecular bonds of heavy hydrocarbons such as petroleum. Palintiff argues that since the evaporation process caused no molecular changes, the resultant separation effected only a change in the condition of the merchandise, and therefore the residual crude BLD was not a newly manufactured product.

The Court finds no reason to believe that the appellate court intended to limit the applicability of *Shell* only to situations in which processing results in the breaking of molecular bonds. The Court holds that *Shell* is controlling where, as in the case at bar, the exported substance was subjected to a process of evaporation which separated a portion of the exported substance and effected a change in the character of the residual substance.

The crude BLD, like the extracted pure MDI, is an article of commerce different from crude 390 HOP. Since the character of the exported product was altered by the evaporation process, the crude BLD is not a product of the United States, but a manufacture of the Netherlands. Since the imported merchandise is not the same as that which was exported, it is not necessary for the Court to consider the value or condition of the merchandise. *Shell*, 27 CCPA at 98; *Burgess Battery Co.* v. *United States*, 13 Cust. Ct. 37, 48, C.D. 866 (1944).

Conclusion

Plaintiff has failed to demonstrate that the government's classification is incorrect, and the Court affirms the classification of the entry under item 403.90, TSUS. Judgment will be entered accordingly.



DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				ITEM NO. AND RATE	I
P85/256	Ford, J. November 27, 1985	J.E. Mamive & Sons, Inc.	82-11-01566-S	Item 389.62 15%+25¢ per lb.	Ite
P85/257	Restani, J. November 27, 1985	Alaron Inc.	84-3-00343	Item A684.62 Free of duty, telephone handset portion Item 685.24 8.2%, clock-radio portion	Ite tel por Ite rad
P85/258	DiCarlo, J. November 27, 1985	A. Giurlani & Bros.	83-8-01171	Item 148.56 Various rates	Ite
P85/259	Restani, J. November 29, 1985	E. Gluck Corp.	84-2-00276	Item 715.05 (716.14/716.18) Various rates for modules Item 720.24 or 720.28 Various rates for cases Item 740.35 Various rates for bands	Ite 5.1 mo ban

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
D	ITEM NO. AND RATE		
	Item 706.24 20%	J.E. Mamive & Sons, Inc. v. U.S.; C.D. 4878 (1980)	New York Bags or tote bags
t lio	Item A684.62 Free of duty, telephone handset portion Item 685.34 4.7%, clock radio portion	Nichimen Co. v. U.S., S.O. 83-28	San Francisco Rhapsody RY-170/T combination AM/FM L.E.D. clock radio/telephone as per P.O. 2358
	Item 148.44 20%	A. Giurlani & Bros. v. U.S., S.O. 85-17	Los Angeles Olives
	Item 688.36 5.5%, 5.3%, 5.1% or 4.9%, for modules, cases and bands	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases; or modules, cases, and bands; an entirety

ABSTRACT PROTEST DECI

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED ITEM NO. AND RATE
P85/260	Restani, J. November 29, 1985	E. Gluck Corp.	84-3-00416	Item 715.05 (715.14/716.18) Various rates of modules Item 720.24 or 720.28 Various rates for cases Item 740.35 Various rates for bands
P85/261	Restani, J. November 29, 1985	Les Industries, Provinciales Ltd.	83-3-00479	Item 771.55 9.5% or 9%

ABSTRACT REAPPRAISEM

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
R85/489	Watson, J. November 27, 1985	E.S. Novelty Co.	263873-A	Export value
R85/490	Watson, J. November 27, 1985	Frank P. Dow Co.	R59/6028; etc.	Export value

DECISIONS—Continued

ED AND	HELD ITEM NO. AND RATE	BASIS	PORT OF ENTRY AND MERCHANDISE
.18) tes of r tes tes ;	Item 688.36 5.5%, 5.3%, 5.1% or 4.9%, for modules, cases and bands	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases; or modules, cases, and bands; an entirety
	Item 870.40 Free of duty	Agreed statement of facts	Champlain 5/16 inch plastic tubing

AISEMENT DECISIONS

F ON	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	New York Silk & rayon scarves
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Los Angeles Cotton blouses, etc.

R85/491	Watson, J. November 27, 1985	W.T. Grant Co.	282294-A, etc.	Export value

value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Dinnerware

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